Supreme Court, U.S.
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No. 09-1545

In The
Supreme Court of the United States

NAHZY A. BUCK,
Petitioner,

v.

THOMAS M. COOLEY LAW SCHOOL,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

I. Under what circumstances does the rigid application of res judicata offend public policy and result in manifest injustice, thereby barring a plaintiff from presenting her federal claims in a federal forum?

That is, should public policy principles and manifest injustice exceptions apply to preclusion issues, especially where res judicata is used as a scythe mechanically to mow down a party's new claims on new facts and new legal theories, and where the party asserting those claims is not at fault for lack of their adjudication in a prior state action?

II. Should a dismissal under Rule 12(b)(6) be reversed when the movant law school judicially admits to differential treatment of similarly-situated students and in clear defiance of a court order, as a manifest injustice exception to res judicata for social policy reasons?

III. When considering a dismissal under Rule 12(b)(6) on preclusion grounds, should a reviewing court apply the public policy calculus as set forth by the Supreme Court of Ohio, and as adopted by Supreme Court of Michigan and other jurisdictions as well?

In other words, should Justice Wanamaker's four-pronged calculus of (1) community common sense/common conscience; (2) conventions of the people of what is naturally and inherently just and right; (3) primary principles of equity and justice; and (4) when a course of conduct is cruel or shocking to the average man's conception of justice be applied to equitably mitigate the rigid application of res judicata that might otherwise offend public policy and result in manifest injustice?

IV. Does a plaintiff have a duty to supplement her complaint during a stay pending appeal?

V. Does a plaintiff have a duty to supplement her complaint during on remand to dismiss her case with prejudice, when doing so would result in almost certain futility?

PARTIES TO THE PROCEEDING

The parties to this litigation who appeared below are:

Plaintiff (Petitioner):
Nahzy A. Buck

Defendant (Respondent):
Thomas M. Cooley Law School

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Nahzy Buck, respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

1. The decision of the United States Court of Appeals for the Sixth Circuit, entered March 17, 2010, is now a published opinion:

   Nahzy Buck v. Thomas M. Cooley Law School, 597 F.3d 812 (6th Cir. 2010).

2. The decision of the United States District Court for the Western District of Michigan, Southern Division, entered March 18, 2009, is now a published opinion:

   Nahzy A. Buck v. Thomas M. Cooley Law School, 615 F. Supp. 2d 632 (W.D. Mich. 2009).

JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 17, 2010.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This Petition involves the following statutory provisions: hostile environment discrimination under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; disability discrimination under 42 U.S.C. § 12182(a); interference and intimidation under Title V of the ADA, 42 U.S.C. § 12203(b); retaliation under Title V of the ADA, 42 U.S.C. § 12203(a), and punitive damages under 42 U.S.C. § 12188; retaliation under Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MICH. COMP. LAWS § 37.1102.

Federal rules involved include Fed.R.Civ.P. 12 (b)(6).

STATEMENT OF THE CASE

Whether Petitioner's suit was barred by res judicata is a controlling question of law. Petitioner's federal cause of action is set forth in her complaint. In its instant opinion, the Sixth Circuit characterizes Petitioner's federal cause of action as follows:

> Plaintiff filed this federal action on December 10, 2007, alleging violation of the Americans with Disabilities Act (ADA), violation of the Michigan Persons with Disabilities Civil Rights Act, and breach of various implied contracts.[1]

This is a rather skewed and reductionist characterization of Petitioner's federal cause of action.[2] It is not uncharitable to say that the District Court presents a much more accurate overview of Petitioner's federal cause of action:

> Plaintiff Nahzy A. Buck is a former student at Defendant Thomas M. Cooley Law School.

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[1] *Buck v. Cooley*, 597 F.3d 812, 816 (6th Cir. 2010).

[2] *Id.*

> Plaintiff filed this action in federal court seeking relief related to her academic dismissal from law school in January of 2006, after plaintiff's prior state-court action involving her 2001 academic dismissal was decided in favor of defendant. Plaintiff's 91-page federal complaint alleges seven counts pertaining to her court-ordered enrollment in law school during the pendency of her state case: Count 1, Hostile Learning Environment Discrimination (Americans with Disabilities Act [ADA] Title III), 42 U.S.C. § 12101 et seq.; Count 2, Disability Discrimination (ADA Title III), 42 U.S.C. § 12182(a); Count 3, Interference and Intimidation (ADA Title V), 42 U.S.C. § 12203(b); Count 4, Retaliation (ADA Title V), 42 U.S.C. § 12203(a); Count 5, Retaliation, Michigan's Persons with Disabilities Civil Rights Act 1 (PWDCRA), MICH. COMP. LAWS § 37.1102; Count 6, Breach of Contract; and Count 7 (Punitive Damages), 42 U.S.C. § 12188.[3]

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[3] *Nahzy A. Buck v. Thomas M. Cooley Law School*, 615 F. Supp. 2d 632, 634 (W.D. Mich. 2009).

Petitioner, Nahzy A. Buck, who was clinically diagnosed for a learning disability, was academically dismissed by Respondent, Cooley Law School, in 2001. She filed a state court lawsuit in 2002 "Misleading/Misdiagnosis Claim" and an "Accommodation Claim" along with a breach of contract claim, as the Court of Appeals has noted:

> A. MISLEADING/MISDIAGNOSIS CLAIM
>
> Defendant asserts that the PWDCRA imposes no duty on an educational institution to diagnose a plaintiff's potential disabilities. The trial court in this case seemed to agree with that proposition but, nevertheless, went on to hold that there is a duty to not misdiagnose a condition and potentially mislead a student. In other words, the trial court apparently concluded that although no duty to diagnose existed, because defendant allegedly undertook such a duty, it could be liable for failing to carry it out properly. We hold that

> the trial court erred in reaching that conclusion.[4]

Petitioner also moved for an injunction to put her back in law school. The trial court granted the injunction, in which Judge Giddings ordered Cooley Law School to treat Nahzy Buck as any "other, similarly-situated law student":

> THIS MATTER having come before this Court pursuant to the Temporary Restraining Order entered by this Court on Friday, August 30, 2002, arguments and evidence having been heard and received by the Court, and the Court being otherwise fully advised in the premises;
>
> IT IS HEREBY ORDERED that Defendant Thomas M. Cooley Law School, its officers, agents, employees and those acting in concert and participation with said Defendant who receive actual knowledge of the content of this Order, be and they hereby are, RESTRAINED

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[4]*Buck v. Thomas M. Cooley Law School*, 725 N.W.2d 485, 488–489 (Mich. App. 2006).

> AND ENJOINED from excluding and prohibiting in any manner, Plaintiff's registration for, attendance at, and participation in such classes as are offered by Defendant Thomas M. Cooley Law School to its other, similarly situated law student;
>
> The within PRELIMINARY ORDER OF INJUNCTION is granted to prevent further interruption and delay in Plaintiff's legal education to mitigate those injuries and damages alleged in Plaintiff's Verified Complaint, and as set forth in the Temporary restraining Order, including to prevent the possibility of an ongoing violation of Plaintiff's statutory and Constitutional rights by Defendant.[5]

Petitioner was enrolled as a restart student in May 2002, after Cooley's initial refusal to honor Judge Giddings TRO.[6] After Nahzy's first term, Cooley sought to expel Nahzy again, despite the fact that she had made the Honor Roll and Dean's List

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[5]Qtd. in Petitioner's federal complaint, ¶ 158.

[6]See Petitioner's federal complaint, ¶¶ 117–159.

that term. Short of a contempt charge, Judge Giddings reprimanded Cooley for its actions. On September 16, 2002, in a direct examination of these events, Judge Giddings indicated that Cooley's initial refusal to register Nahzy shocked the conscience of the Court:

> THE COURT [to Mr. McCasey]: Well, I tell you this. ... I can't imagine that the people at Thomas Cooley Law School can have any misunderstanding about the significance of a court order. ... I mean, most people in this state and in most other states, when they see an order, they're usually pretty clear on what that means, and it usually doesn't mean calls to lawyers and discussions and committee meetings and sidetracks and somebody being told to come back in a couple of days. That's not what court orders mean, and I'm just quite, you know – we'll see about this, but I have to tell you I'm – I'm rather taken aback.[7]

The trial court also denied Cooley's motion for summary disposition (in part). Cooley filed an

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[7]Qtd. in Petitioner's federal complaint, ¶ 159.

interlocutory appeal to the Michigan Court of Appeals. During the pendency of the interlocutory appeal, Nahzy continued to attend law school classes under the injunctive order. From May 2002 through December 2005, Nahzy took all her required courses and most of her elective courses with her husband, Dr. Christopher Buck, who attended part-time from May 2002 through August 2004 while teaching full-time at Michigan State University and who then graduated on January 22, 2006. However, Nahzy was expelled two credits short of graduating. Dr. Buck witnessed and had personal knowledge of the facts underlying Nahzy's claims of a retaliatory hostile learning environment.

Petitioner alleges that Cooley retaliated against her when they expelled her a second time. She then filed her federal cause of action (by way of a complaint written by her husband, Dr. Buck), essentially arguing that she was retaliated against for filing the first lawsuit. The U.S. District Court, Judge Janet Neff presiding, dismissed the case under preclusion principles. The case was appealed to the U.S. Court of Appeals, which affirmed, in its opinion and order dated March 17, 2010.

In her Appellant's Brief (written by Christopher Buck, Esq. and Nicholas Roumel, Esq.)

and Appellant's Reply Brief (written by Christopher Buck, Esq.), Petitioner maintains that her first complaint arose from her "first dismissal" from Cooley Law School on June 6, 2001, but her second complaint arose, after she had been readmitted to the law school as a restart student in May 2002, from her "second dismissal" on March 1, 2006 (which is the date of dismissal entered on Petitioner's Cooley Law School transcript). Nahzy's first period of enrollment at Cooley Law School was from May 2000 – April 2001, while her second course of study was from May 2002 – December 2005. This unique fact – of the two separate periods of enrollment – is what distinguishes this case from the cases that Cooley cited regarding res judicata and collateral estoppel.

Petitioner invokes new facts and new legal theories in support of her new claims. The relationship of the new claims, theories and facts (as alleged in her federal complaint, filed on December 10, 2007) to the previous claims, theories and facts (as alleged in the state court action, filed on April 12, 2001) is that the federal court action presupposes the state court action. Plaintiff's federal complaint was filed approximately five years and eight months after her state court complaint was filed.

The relationship of the new claims (in the instant federal action) to the old claims (the state action) is clear and simple: Petitioner's state action was a lawful "protected activity" in which she engaged and, as a result of which, she experienced adverse consequences. The first cause of action was essentially a "Misleading/Misdiagnosis Claim" and an "Accommodation Claim" against Cooley Law School, while the second cause of action was principally a retaliation claim and wrongful dismissal claim against Cooley Law School for having denied Petitioner her Juris Doctor degree. The federal action alleges retaliation because of Petitioner's state action (i.e. her "protected activity"). This retaliation took place during the tense, court-ordered second period of enrollment. These acts of retaliation involved, *inter alia*, unnecessary delay, interference in accommodations, anomalous grading, selective enforcement, arbitrary and capricious administrative actions, abuse of discretion, and a severe and pervasive hostile learning environment. These retaliatory actions culminated in Petitioner's arbitrary and unfair dismissal.

Specifically, these acts included: [Count I] (1) disability-based bias by Dean Zelenski; (2) hostility from Dean Wysocki; (3) refusal to advise by Professor

Peden; (4) interference by Dean Cercone; (5) initial refusal by Cooley Administration to reinstate Plaintiff, under Court Order, as a restart student; (6) animus by Cooley attorneys at mediation; (7) animus by President LeDuc; (8) animus by legal advisor to President LeDuc, each in violation of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq.; [Count II] (9) interference in grade appeals process; (10) interference in Michaelmas 2005 appeals process; (11) intimidation by Dr. Zelenski; (12) vexatious charge of honor code violation, each in violation of 42 U.S.C. § 12182(a); [Count III] (13) retaliation, in violation of Title V of the ADA, 42 U.S.C. § 12203(b); [Count IV] (14) retaliation, in violation of 42 U.S.C. § 12203(a); [Count V] and retaliation in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL § 37.1602; (15) interruption and other interference by proctors during exams; [Count VI] breach of contract due to (16) compromised anonymity in grading procedure; (17) arbitrary and capricious denial of grade appeals; (18) frivolous and vexatious charge of honor code violation; (19) failure to make "every effort" to "provide reasonable accommodations"; (20) failure to account for or provide equitable options for missing exam; (21) failure to accept rightful "void" of

failing grade; (22) refusal of advisor to advise assigned advisee; (23) arbitrary and capricious abuse of discretionary authority; (24) departure from American Bar Association Standard 304; (25) failure to permit option of oral exam and other options; (26) wrongful academic dismissal; and [Count VI] punitive damages for all of the above acts which, combined, represent egregious violations of Petitioner's civil and contractual rights.

The following table illustrates this distinction between Petitioner's two factually and theoretically distinct sets of claims in the state and federal court actions:

TABLE 1:
SUMMARY OF CLAIMS

STATE CLAIMS (2002)	FEDERAL CLAIMS (2006)	NEW CLAIMS?
Count I Breach of Fiduciary Duty	Count I: Hostile Environment Discrimination (ADA Title III)	DF's hostility result of PL's prior protected activity.
Count II: Violation of Consumer Protection Act	Count II: Disability Discrimination(ADA Title III)	DF's discrimination result of PL's prior protected activity.
Count III: Violation of the PWDCRA	Count III: Interference and Intimidation(ADA Title V)	DF's retaliation result of PL's prior protected activity.
Count IV: Violation of Due Process	Count IV: Retaliation (ADA Title V)	DF's interference result of PL's prior protected activity.
	Count V: Retaliation (PWDCRA)	DF's retaliation result of PL's prior protected activity.
	Count VI: Breach of Contract	DF's breach of contract result of PL's prior protected activity.
	Count VII:	Punitive damages

In the first action, Nahzy had undertaken just one year of study. In the instant action, Nahzy had completed nearly five years of courses, and had substantially performed her requirements for a Juris Doctor degree, having earned 88 out of the required 90 credits, despite her learning disability and while enduring a manifestly hostile environment.

Because this Petition challenges a judgment which affirmed an order dismissing a complaint, the allegations of the relevant federal complaint and Reply Brief of the Appellant (see Appendix D) must be considered true.

Respondent, Cooley Law School, filed a motion to dismiss Petitioner's claim under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. The District Court granted Cooley's motion on preclusion and causation grounds. Petitioner appealed and the Court of Appeals affirmed the District Court's dismissal on the grounds of res judicata, from which ruling Petitioner now appeals.

SUMMARY OF ARGUMENT

I. The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because application of res judicata in the case at bar offends public policy and results in manifest injustice; therefore the public policy and manifest injustice exceptions to res judicata should apply, yet the Court of Appeals did not apply a public policy analysis, notwithstanding Petitioner's manifest injustice argument on public policy grounds.

II. The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)\(6) because it failed to consider Cooley Law School's admitted differential treatment of similarly-situated students as a manifest injustice exception to res judicata for social policy reasons, and because Cooley's judicial admission is a new controlling fact for purposes of res judicata analysis; Cooley is bound by its judicial admission that it would never confer a juris doctor degree upon Petitioner under any circumstances, which is

manifest injustice in clear defiance of a court order.

III. The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because it failed to apply the public policy calculus as set forth by the Supreme Court of Michigan in the case at bar.

IV. Alternatively, the Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because the Court admits that there is a conflict of authority over whether a plaintiff has a duty to supplement her complaint during a stay pending appeal.

V. Alternatively, the Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because Petitioner could neither supplement her complaint during a stay in the proceedings, nor on remand to dismiss her case with prejudice, without undue hardship and almost certain futility.

ARGUMENT

I. The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because application of res judicata in the case at bar offends public policy and results in manifest injustice; therefore the public policy and manifest injustice exceptions to res judicata should apply, yet the Court of Appeals did not apply a public policy analysis, notwithstanding Petitioner's manifest injustice argument on public policy grounds.

The Sixth Circuit has enunciated the principle that res judicata should never be rigidly applied if doing so would offend an overriding public policy or result in manifest injustice:

> Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding

> public policy or resulted in manifest injustice to a party.[8]

The Supreme Court of Michigan has adopted the following definition of "public policy" famously stated by Justice Wanamaker, writing the opinion of the Supreme Court of Ohio:

> What is the meaning of "public policy?" A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts. ... In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.

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[8]*United States v. La Fatch*, 565 F.2d 81, 84 (6th Cir. 1977) (citation omitted).

Sometimes such public policy is declared by constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people – in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.

It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic.

When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be constitution, statute or decree of court. ...

Public policy is the cornerstone -- the foundation – of all constitutions, statutes and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true,

> whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.[9]

What, specifically, was the violation of public policy by the Respondent, Thomas M. Cooley Law School? Here, Petitioner will cite a judicial admission by Cooley itself:

> Plaintiff was not entitled to conferral of degree because of the events which occurred after entry of the TRO because she was not entitled to conferral of a degree prior to entry of the TRO. Indeed, had Plaintiff accumulated sufficient credits, no degree would have been conferred unless and until she succeeded in her claim that she was improperly dismissed in 2001.[10]

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[9] *Skutt v. Grand Rapids*, 266 N.W. 344, 346 (Mich. 1936) (citing *Pittsburgh, C., C. & S. L. R. Co. v. Kinney*, 115 N.E. 505, 506–507 (Ohio 1916).

[10] *Reply Brief of the Appellant*, p. 10 (citing *Appellee's* [Cooley's] *Brief*, 25, n.10) (emphasis added).)

Similarly, Cooley elsewhere admitted:

> Plaintiff fails to appreciate that, unless and until the Court of Appeals ruled that Cooley Law School improperly dismissed/failed to restart Plaintiff in January of 2001 [sic; read June 2001], Cooley Law School would never have awarded Plaintiff a juris doctor degree, regardless of how long Plaintiff continued to take classes pursuant to the TRO.[11]

In light of this new revelation, and within the precise contours of the case, this honorable Court should seriously consider the implications of this new controlling fact. Petitioner was admitted as a restart student under court order. A later determination that this court order was improper did not retroactively remove Cooley's administrative obligations to treat Petitioner as any other similarly-situated student, once Cooley began accepting Petitioner's tuition money, term after term. While new theories and new remedies do not, standing alone, create new claims, their combination with new facts most definitely can.

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[11] *Reply Brief of the Appellant*, p. 17 (citing *Appellee's* [Cooley's] *Brief*, 23) (emphasis added).

Res judicata and collateral estoppel are different theories that often lead to the same result, but both doctrines are not to be applied rigidly, if doing so would result in a manifest injustice. The Sixth Circuit has previously affirmed the manifest injustice exception: "Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice."[12] The Sixth Circuit has further said: "A contrary result, to use the language of Professor Moore, would create a situation where 'res judicata renders white black, the crooked straight'."[13]

Instantly, the Sixth Circuit has rendered the white black and has rendered the crooked straight by holding that no manifest injustice resulted, thereby upholding general preclusion in the case at bar. The Sixth Circuit, moreover, misrepresented the gravamen of Petitioner's manifest injustice argument:

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[12]*Tipler v. E. I. deNemours & Co.*, 443 F.2d 125, 128 (6th C *duPont* ir. 1971).

[13]*United States v. La Fatch*, 565 F.2d 81, 84 (6th Cir. 1977) (citation omitted).

Plaintiff also argues that the application of claim preclusion principles to her case would work a "manifest injustice," and that there is an "extraordinary reason" (the state courts' failure to "yield a coherent disposition of the present controversy") not to bar her suit. We have recognized an exception to preclusion principles when "an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party." *United States v. LaFatch*, 565 F.2d 81, 84 (6th Cir. 1977) (quotations omitted); see also *Storey v. Meijer, Inc.*, 431 Mich. 368, 377 n.9, 429 N.W.2d 169, 173 n.9 (1988). Plaintiff complains that application of res judicata here would work a "manifest injustice" because she is unable to fulfill her desire to become an attorney. A litigant's suffering the consequences of a prior adverse ruling does not compel the application of this exception. To indulge such reasoning would create an exception that swallows the rule.[14]

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[14]*Buck v. Cooley*, 597 F.3d 812, 819 (6th Cir. 2010).

Here, the U.S. Court of Appeals ignored or mischaracterized Petitioner's argument for a manifest injustice exception to res judicata.[15] The Sixth Circuit briefly addressed Petitioner's manifest injustice argument, if only to dispense with it. Yet the manifest injustice exception to res judicata is at the heart of Petitioner's case. Petitioner's manifest injustice argument was based, in large part, on Cooley's judicial admission, in its Appellee's Brief, that it would never confer a juris doctor degree upon Petitioner, which judicial admission was also raised in oral arguments by Attorney Nicholas Roumel; yet the Court of Appeals' failure to address that issue is an argument from silence the Court did not deign it important enough to discuss Cooley's judicial admission – and its clear implications of manifest injustice – in its decision.

Curiously, neither the Court of Appeals nor the District Court took notice of the earlier judicial admission in which Cooley conceded that Nahzy Buck may have had an actionable claim had she been enrolled as a "proper student":

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[15] *Reply Brief of the Appellant*, pp. 7–12 and 34–36 (See Appendix D, pp. 7–12 and 34–36 [numbered pp. "1–6 and 28–30" at bottom])

> If Plaintiff was properly a student at the time of the alleged discrimination, then, in theory, **the allegedly discriminatory and retaliatory acts by Cooley Law School could be a cause of Plaintiff being denied a Juris Doctor degree**.[16]

Although it technically expired, the TRO was never vacated or dissolved, and even Cooley acknowledges "the fact that she was permitted (per the TRO) to remain in school until January of 2006."[17] How could the Circuit judge have issued a TRO that required Cooley to allow Plaintiff "attendance at and participation in such classes as are offered to other similarly-situated law student[s]" without the prospect of graduation? For Cooley to have overtly complied with the TRO, yet covertly refusal to fully comport with its terms raises serious questions that go to the very heart of plaintiff's "manifest injustice" argument.

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[16]Qtd. in *Reply Brief of the Appellant*, p. 20 (emphasis added).

[17]Qtd. in *Reply Brief of the Appellant*, p. 20. (citing Appellee's Brief, 19–20.).

II. **The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because it failed to consider Cooley Law School's admitted differential treatment of similarly-situated students as a manifest injustice exception to res judicata for social policy reasons, and because Cooley's judicial admission is a new controlling fact for purposes of res judicata analysis; Cooley is bound by its judicial admission that it would never confer a juris doctor degree upon Petitioner under any circumstances, which is manifest injustice in clear defiance of a court order.**

The case at bar presents jurisprudentially significant issues regarding the ill-defined manifest injustice exception to res judicata, since res judicata should not be invoked where it would defeat the ends of justice. In its *Appellee's Brief*, Cooley makes this stunning admission:

> Plaintiff was not entitled to conferral of degree because of the events which occurred after entry of the TRO because she was not entitled

> to conferral of a degree prior to entry of the TRO. Indeed, had Plaintiff accumulated sufficient credits, no degree would have been conferred unless and until she succeeded in her claim that she was improperly dismissed in 2001.[18]

Respondent, Cooley Law School, is bound by its judicial admission that it never had any intention of conferring a degree on Petitioner under any circumstances whatsoever, in clear defiance of a court order that Cooley treat Nahzy Buck as any other similarly-situated student. A judicial admission is defined as a formal concession in the pleadings or stipulations by a party or its counsel that are binding upon the party making them. Cooley's statement cannot be contradicted on appeal. Judicial admissions are proof possessing the highest possible probative value. Here, Respondent plainly, consistently, and unequivocally stated its intention not to treat Petitioner as any other similarly-situated law student.

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[18] *Reply Brief of the Appellant* (citing *Appellee's* [Cooley's] *Brief*, 25, n.10; see also similar statement on 23 (emphasis added).

The Sixth Circuit had discretion to consider a statement made in an appellate brief to be a judicial admission, binding on both the Court of Appeals and the District Court: "Where a statement in an appellate brief is 'deliberate, clear and unambiguous,' as is Appellant's statement, the Panel has discretion to consider the statement to be a judicial admission."[19] This judicial admission is binding on Respondent and precludes it from now arguing the opposite.

Cooley's judicial admission, Petitioner submits, qualifies as a manifest injustice and should shock the judicial conscience of Court of Appeals for the Sixth Circuit. All the while that Nahzy Buck was paying tuition, attending lectures, spending countless hours studying, writing final exams and cumulatively earning 88 credits out of the 90 credits required for

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[19] *Robilio v. Stevenson (In re Robilio)*, 2007 Bankr. LEXIS 2264 at 11 (6th Cir. 2007) (citing *United States v. Burns*, 109 Fed. App'x 52, 58 (6th Cir. 2004); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226–27 (9th Cir. 1988) (holding that statements of fact contained in a brief may be considered admissions of the party in the discretion of the court); *City Nat. Bank v. United States*, 907 F.2d 536, 544 (5th Cir. 1990)).

graduation, Cooley withheld its secret intent by not disclosing to Nahzy that Cooley was determined never to confer on her a juris doctor degree, even had she made the Dean's List every semester (instead of just one semester). Perhaps no other law school has harbored such deep animus towards one of its own students.

The District Court noted that Nahzy Buck "was granted an ex parte Temporary Restraining Order (TRO), requiring defendant [Cooley] to permit plaintiff to reenroll in law school and attend classes as are offered to any other similarly-situated law student (Pl. Res Br., Ex. E)."[20] In other words, the Circuit Court intended that Nahzy Buck be treated as any other Cooley law student.

Cooley's admission is only the tip of the iceberg. This Court can only imagine what Nahzy had to go through in such a hostile learning environment. While, in her very last term in fall 2005, Cooley's administrators were preparing Plaintiff for graduation – during which time her graduation picture was taken, and by having her cap and gown measured, and her graduation name

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[20] *Buck v. Cooley*, 597 F.3d 812, 819 (6th Cir. 2010) (emphasis added).

verified – at no time did Cooley ever tell Petitioner of its intention never to confer Petitioner's degree, if earned. Notwithstanding the fact that Cooley Law School had been accepting Nahzy's tuition money all along, from May 2002 through December 2005, Cooley has perpetrated a great deception on this student, and Cooley thus was unjustly enriched for above $100,000 tuition in the process.

While a law student pays tuition to receive credits for a legal education, those credits are to fulfill requirements for the conferral of a juris doctor degree. This manifest injustice inheres not just in Cooley's deep-seated animus, but in its grand deception in giving the appearance that Nahzy Buck was working toward her degree like any other similarly-situated student, while Cooley Law School getting unjustly enriched in the process.

In ¶¶ 202–204 of her federal complaint, Petitioner presents further evidence of Cooley's disparate treatment of Nahzy from the disclosures of her advisor at that time, Professor Maurice Munroe, a highly-respected constitutional law professor at Cooley Law School:

> 202. On January 6, 2006, Professor Munroe disclosed to Plaintiff that he had

personal knowledge of several students who had been helped in similar situations, as evidenced in the following communication from Nahzy to her attorney:

> Yesterday I met with Professor Munroe (CONFIDENTIAL). He went and met Corcone [Cercone] to see if he could get him to be lenient towards me. Cercone had denied that he knew or was involved in my legal case. He basically had said he would not be lenient. Munroe shared with me his knowledge of "some students" who had been helped in similar situations. For example he suggested that may be [maybe] I could be given to write a paper or so in lieu of the Biz Org [exam] and so on. (Nahzy Buck to attorney Beverly Baligad, e-mail, January 7, 2006.)

203 On January 6, 2006, Professor Munroe suggested, based on the administrative precedents set by these similarly-situated students, that perhaps Ms. Buck could be asked to write a paper in

> lieu of retaking her Business Organizations final exam, and so forth.
>
> 204. Therefore Plaintiff can establish that her academic dismissal was pretextual to the extent that similarly-situated students were allowed to graduate under arrangements that were not afforded as options for the Plaintiff. [21]

There is no easy calculus for manifest justice determinations. In case law, most of the discussion of what qualifies as manifest injustice has to do with criminal law matters. Yet the fact remains that Cooley Law School is bound by its judicial admission that it would never confer a juris doctor degree upon Petitioner under any circumstances. Cooley's differential treatment of similarly-situated students qualifies as manifest injustice for social policy reasons and is, moreover, a new controlling fact for purposes of res judicata analysis.

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[21]See Petitioner's federal complaint, ¶¶ 202–204.

III. The Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because it failed to apply the public policy calculus as set forth by the Supreme Court of Michigan in the case at bar.

In its decision, the Sixth Circuit, invoking res judicata principles as defined by Michigan state law, failed to apply the public policy calculus as set forth by the Supreme Court of Michigan in the case at bar. Under the *Skutt* standard, that calculus would arguably consist of a four-pronged test:

1. Community common sense and common conscience, extended and applied to matters of public morals, public health, public safety, public welfare and the like.
2. Customs and conventions of the people – in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.
3. Primary principles of equity and justice;

4. When a course of conduct is cruel or shocking to the average man's conception of justice.[22]

As applied to the case at bar, Cooley's resolve to treat Nahzy Buck differentially (1) contravenes community common sense and common conscience, extended and applied to matters of public morals and public welfare; (2) offends conventions of the people as to what is naturally and inherently just and right between man and man; (3) violates primary principles of equity and justice; and (4) shocks the average man's conception of justice. In so doing, Cooley's behavior towards Nahzy Buck should shock the judicial conscience, just as it shocks the reasonable person's sense of fair play and justice.

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[22]*Skutt v. Grand Rapids*, 266 N.W. 344, 346 (Mich. 1936) (citing *Pittsburgh, C., C. & S. L. R. Co. v. Kinney*, 115 N.E. 505, 506–507 (Ohio 1916).

IV. Alternatively, the Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because the Court admits that there is a conflict of authority over whether a plaintiff has a duty to supplement her complaint during a stay pending appeal.

The District Court for the Western District of Michigan and the Sixth Circuit Court of Appeals have successively held that Petitioner had a duty to supplement her complaint continuously to simultaneously include all legal theories arising from the same transaction. However, the Sixth Circuit conceded that there is a split of authority over whether Petitioner was under a duty to supplement her complaint during a stay pending Cooley's appeal.

Procedurally, on 07/08/2005, Judge Giddings granted Defendant's Motion for Stay of Proceedings Pending Appeal.[23] The Sixth Circuit has noted this stay in the proceedings: "The state trial court then agreed to stay proceedings during the appeal Plaintiff filed her supplemental complaint on April

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[23] *Register of Action*, Entry #141. (See Appendix E-6).

27, 2005."[24] Here, the Sixth Circuit creates the wrong impression that Petitioner had filed her supplemental complaint ***after*** Cooley's motion to stay, rather than ***before***. Petitioner's Motion for Leave to File Supplemental Complaint was filed on 03/04/2005,[25] and the supplemental complaint itself on 04/26/2005,[26] clearly before Cooley's motion to stay the proceedings pending appeal.

The Sixth Circuit Court of Appeals then declined to rule on whether Petitioner had a duty to supplement her pleadings, notwithstanding the circuit court's grant of Cooley's motion to stay, but to did point to a split of authority on this issue:

> Because we find that plaintiff should have sought to supplement her complaint in the state trial court following remand, we need not decide whether a plaintiff has a duty under Michigan law to supplement a complaint during the pendency of an appeal. However,

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[24] *Buck v. Cooley*, 597 F.3d 812, 815 (6th Cir. 2010).

[25] *Register of Action*, Entry #107. (See Appendix E).

[26] *Register of Action*, Entry #118. (See Appendix E-2).

> we note that there is an apparent conflict in state jurisprudence on this issue. The Michigan Court of Appeals has held that the trial court loses jurisdiction to grant leave to amend after an appeal is filed. *Wiand v. Wiand*, 205 Mich. App 360, 369-370, 522 N.W.2d 132, 136 (1994). Nevertheless, in *Adair*, the Michigan Supreme Court implicitly reached the opposite conclusion by finding the plaintiffs' challenge to various statutory amendments barred by res judicata because they could have raised the issue in a prior litigation.[27]

Michigan case law specifically addressing the effect of a stay pending appeal on supplemental pleadings is sparse. Perfecting an appeal, as a general rule, automatically stays the proceedings. The Sixth Circuit Court of Appeals cited *Wiand v. Wiand*, 522 N.W.2d 132, 136 (1994), in which the Michigan Court of Appeals held:

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[27]*Buck v. Cooley*, 597 F.3d 812, 818, n.2 (6th Cir. 2010).

> Finally, plaintiff argues that the trial court improperly denied her motion to amend her complaint to add a claim for independent equitable relief in *Wiand II*. However, the trial court properly found that it lacked jurisdiction to grant plaintiff's motion under MCR 7.208(A) because a claim of appeal had already been filed from the order of dismissal.

MCR 7.208(C)(2) provides: "After the record is filed in the Court of Appeals, the trial court may correct the record only with leave of the Court of Appeals." Apart from having "jurisdiction" to effect a "Correction of Defects" (7.208(C)), the lower court must await the decision by the Court of Appeals.

Lower courts have always had the power to preserve the status quo after an appeal has been filed. The Supreme Court has long deemed this obvious: "Undoubtedly, after appeal the trial court may, if the purposes of Justice require, *preserve the status quo until decision by the appellate court.*"[28]

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[28] *Newton v. Consolidated Gas Co. of N.Y.*, 258 U.S. 165, 177–78 (1922) (emphasis added)) (citing *Hovey v. McDonald*, 109 U.S. 150, 161 (1883) (this power "undoubtedly exists")).

The Sixth Circuit's admission that there is a conflict of authority over whether a plaintiff has a duty to supplement her complaint during a stay pending appeal therefore calls into question, if not invalidates, the Court of Appeal's affirming the District Court's dismissal of Petitioner's federal cause of action.

V. Alternatively, the Court of Appeals improperly upheld the District Court's dismissal under Rule 12(b)(6) because Petitioner could neither supplement her complaint during a stay in the proceedings, nor on remand to dismiss her case with prejudice, without undue hardship and almost certain futility.

A primary purpose of the res judicata doctrine is to protect defendants from the expense and vexation attending multiple law suits.[29] "As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events, regardless of whether a subsequent litigation is pursued in a federal or state

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[29]*Montana v. United States*, 440 U.S. 147, 153 (1979).

forum."[30] Res judicata, however, "is not a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts."[31] Moreover, "[t]he goal of res judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible."[32] None of these salutary purposes for the doctrine of res judicata would be served by its application to this case.

The Court of Appeals agreed that Petitioner's "federal complaint alleges many facts that had not occurred at the time that she had filed her state court complaint": "She correctly observes that these facts were not – and could not have been – included in plaintiff's original state court complaint when it was filed in 2002."[33] However, the Sixth Circuit hastened to add that Petitioner had a duty, pursuant to MCR

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[30]*Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 596 N.W.2d 153, 157 (Mich. 1999)

[31]*Id.* at 158.

[32]*Id.* at 158.

[33]*Buck v. Cooley*, 597 F.3d 812, 817 (6th Cir. 2010).

2.118(E), to supplement her complaint during the pendency of her state action.[34] MCR 2.118(E) provides:

> (E) *Supplemental Pleadings.* On motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense. The court may order the adverse party to plead, specifying the time allowed for pleading.

The operative term here is "may" – emphasizing the discretionary power of the court to permit supplemental pleadings. MCR 2.118(E) does not command a plaintiff to supplement her pleadings over the course of years. In the *Adair* case, which the Court of Appeals cites, the dissent states:

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[34] *Id.*

> It took our courts seventeen years to decide the limited issues actually before them in *Durant I*. In light of that fact, I question that the piecemeal amalgamation of claims suggested by the majority would have actually created a "'convenient trial unit.'" Id. The majority faults plaintiffs for failing to move to add claims under MCR 2.118(E), to an ongoing declaratory judgment action begun seventeen years before this Court's ultimate decision. I do not. It would serve no useful purpose to require plaintiffs to try to add these claims solely to preserve their right to bring them later.[35]

Instantly, a considerable length of time transpired between Petitioner's April 12, 2002 state court action and her December 10, 2007 federal court action, in that her federal complaint was filed approximately five years and eight months after her state court complaint was filed.

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[35]*Adair v. State*, 680 N.W.2d 386, 405–406 (Mich. 2004) (Kelly, J. (concurring in part and dissenting in part)) (emphasis added)

To keep supplementing her complaint with fresh allegations of a retaliatory hostile learning environment, etc., throughout this lengthy period of nearly six years would not only have placed an undue hardship on the Petitioner, but would *not* have been in the best interests of judicial economy, thus contravening one of the firm principles of public policy on which the doctrine of preclusion is based. To then demand that Petitioner have supplemented her complaint on remand stretches credulity to the extreme.

This Court should consider the rule adopted by the Ninth Circuit: "We decline to impose a potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost."[36] See Restatement (Second) of Judgments, § 26(1)(f) (1982) (claim preclusion does not apply where "policies favoring preclusion of a second action are overcome for an extraordinary reason, such as ... failure of the prior litigation to yield a coherent disposition of the controversy"). Res judicata is meant to serve the ends of justice, not subvert them.

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[36] *NAACP v. Los Angeles*, 750 F.2d 731, 739 (9th Cir. 1984).

This Court should find that the District Court's dismissal under Rule 12(b)(6) was improvidently granted, and that the Sixth Circuit's affirmation compounded that error.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Petition presents important questions relating to the scope of the doctrine of res judicata in our system of dual state and federal courts.

As Supreme Court Rule 10 states, a petition for writ of certiorari "will be granted only for compelling reasons," including, among other things, that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." In fact, these are the very grounds cited by Petitioner as a basis for certiorari review. In accordance with this Court's Rules, therefore this Court may properly grant the Petition for Writ of Certiorari in this matter.

This Petition invites the U.S. Supreme Court to review how principles of public policy may be brought to bear on the rigid application of preclusion principles. In so doing, the Court has the opportunity to assure availability of a federal forum for federal claims and questions by rejecting rigid application of preclusion principles that otherwise would contravene recognized principles of public policy and manifest injustice. This Petition invites the Court to apply Justice Wanamaker's maxims and mandates to the issue of the inflexible application of res judicata, in keeping with the Supreme Court of Louisiana's dictum:

> While res judicata is a useful tool, it should not be used as a scythe applied mechanically to mow down claims where the party asserting the claim is not at fault for the lack of adjudication of that claim in the first suit.[37]

What has happened in the case at bar is that res judicata was used as a scythe applied

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[37] *Terrebonne Fuel & Lube, Inc. v. Placid Refining Company*, 666 So. 2d 624, 635 (La. 1996). Qtd. in *Reply Brief of the Appellant*, pp. 15–16.

mechanically to mow down Petitioner's new claims on new facts and new legal theories, and where Petitioner is not at fault for lack of their adjudication in a prior state action. Petitioner has cited specific facts sufficient to deflect the swing of the res judicata scythe, if only Justice Wanamaker's public-policy calculus were to be applied. That calculus would reasonably involve asking the following questions:

1. Does public policy, based on community common sense and common conscience, extended and applied to matters of public morals and public welfare, invalidate the rigid application of preclusion in the instant case?
2. Does public policy, considering the customs and conventions of the people – in their clear consciousness and conviction of what is naturally and inherently just and right between man and man – likewise invalidate the rigid application of preclusion in the instant case?
3. Does public policy, predicated on primary principles of equity and justice,

invalidate the rigid application of preclusion in the instant case?

4. Does public policy, taking into consideration when a course of conduct is cruel or shocking to the average man's conception of justice, invalidate the rigid application of preclusion in the instant case?

Such a calculus would empower courts to equitably temper the rigid application of the res judicata doctrine in limited circumstances, as justice – predicated on public policy principles – dictates.

The questions to be answered by the Supreme Court present issues involving the rigid application of preclusion principles, especially when doing so may contravene public policy and risk manifest injustice, which questions should be resolved to give guidance to all lower courts, federal and state.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Opinion,
filed 03/17/10 ..... A1 - A19

Appellant Reply Brief [Excerpts]
filed 08/12/09 ..... B1 - B11

WESTERN DISTRICT OF MICHIGAN FILING:

Opinion,
filed 03/18/09 ..... C1 - C20

STATE OF MICHIGAN CIRCUIT COURT FILING:

Order for Stay of Proceedings,
filed 07/08/05 ..... D1 - D2

OTHER:

Ingham County, Michigan [Excerpts]
Register of Action ..... E1 - E6

RECOMMENDED FOR FULL-TEXT
PUBLICATION Pursuant to Sixth Circuit Rule 206

File Name: 10a0072p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NAHZY BUCK,
Plaintiff-Appellant,

v. No. 09-1508

THOMAS M. COOLEY LAW SCHOOL,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
No. 07-01230-Janet T. Neff, District Judge.

Argued: January 14, 2010

Decided and Filed: March 17, 2010

Before: KENNEDY, COLE, and GRIFFIN,
Circuit Judges.

COUNSEL

ARGUED: Nicholas Roumel, NICK ROUMEL & ASSOCIATES, Ann Arbor, Michigan, for Appellant. Megan K. Cavanagh, GARAN LUCOW MILLER,

P.C., Detroit, Michigan, for Appellee. **ON BRIEF:** Nicholas Roumel, NICK ROUMEL & ASSOCIATES, Ann Arbor, Michigan, for Appellant. Megan K. Cavanagh, GARAN LUCOW MILLER, P.C., Detroit, Michigan, Michael P. McCasey, GARAN LUCOW MILLER, P.C., Grand Rapids, Michigan, for Appellee.

OPINION

CORNELIA G. KENNEDY, Circuit Judge. Plaintiff appeals from the district court's dismissal of her lawsuit against her former law school as barred by res judicata and a lack of causation. She previously litigated earlier acts of discrimination against her law school in Michigan state courts, and had secured a preliminary injunction allowing her to attend classes. She was then dismissed from the law school on academic grounds. Because plaintiff should have supplemented her complaint in state court with claims that arose during the pendency of that suit, she is precluded by res judicata from raising these claims now.

Therefore, we AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Thomas M Cooley Law School admitted plaintiff Nahzy Buck as a student in December 1999, to begin classes in May 2000. Almost immediately, plaintiff began to struggle with her coursework. Although she sought assistance from university officials and the school's Academic Resource Center, plaintiffs grades were poor and she was placed on academic probation. She then was evaluated by a psychologist, Dr. Ostien, who concluded that the plaintiff has a learning disorder in cognitive processing speed and a generalized anxiety disorder. Dr. Ostien recommended that plaintiff receive extended time for taking exams and that she only carry two courses per semester. Defendant acquiesced to the first condition, but did not allow plaintiff to drop a course to reduce her course load to two. After her third term, following two terms of academic probation, plaintiff had a GPA of 1.43. She was then expelled from law school on June 6, 2001.

On April 12, 2002, plaintiff filed a lawsuit in Michigan state court. She alleged that defendant refused to offer her assistance or provide her with accommodations for her disability, and misled plaintiff as to her ability to obtain accommodations.

She alleged that defendant had breached a fiduciary duty it owed to her, violated the Michigan Consumer Protection Act and the Michigan Persons with Disabilities Civil Rights Act, and deprived her of Due Process under the federal and Michigan constitutions.

On April 15, 2002, the state trial court entered an ex parte temporary restraining order that defendant was "RESTRAINED AND ENJOINED FROM excluding and prohibiting in any manner, Plaintiff's registration for, attendance at, and participation in such classes as are offered by Defendant Thomas M. Cooley Law School to its other, similarly situated law student [sic]." The order notes that it is "granted without notice to prevent further interruption and delay in Plaintiffs legal education." After a hearing, the court converted the restraining order into a preliminary injunction with substantially similar mandatory language. Defendant did not appeal either the restraining order or the preliminary injunction, and plaintiff attended classes until December 2005.

On November 4, 2004, the state court granted summary disposition on several counts, but denied summary disposition on plaintiff's claim of discrimination under the Michigan Persons with

Disabilities Civil Rights Act. Defendant appealed the partial denial of summary disposition to the Michigan Court of Appeals. In March 2005, while the state appeal was pending, plaintiff obtained leave from the state trial court to file a supplemental complaint with allegations of misconduct that had occurred since 2002. However, the state trial court allowed supplementation of events only through the end of April 2002. The plaintiff had sought to also add allegations that defendant's faculty and staff had treated her poorly by, among other things, accusing her of cheating on a homework assignment, denying her request to be in the same study group as her husband, giving her poor grades, and being abrupt with her. The trial court denied this request because it concluded that such facts, if true, could not provide the basis for plaintiff s retaliation claim. The state trial court then agreed to stay proceedings during the appeal. Plaintiff filed her supplemental complaint on April 27, 2005.

While this state litigation was ongoing, plaintiff matriculated under the terms of the injunctive order, hopeful of a January 22, 2006 graduation date. Plaintiff alleges that defendant undertook preparations for plaintiffs graduation in the fall of 2005, fitting plaintiff for a commencement

cap, verifying her name for her diploma, and taking her senior portrait. Notwithstanding this, plaintiff also alleges that she experienced a hostile environment throughout her studies, including in her final term, and this hostility caused her additional anxiety, which in turn interfered with her class performance. She claims the defendant initially denied her registration when she presented it with the injunctive order on April 22, 2002, and expressed hostility towards her registration for classes; defendant's representative refused to settle with her during mediation; Registrar Sherida Wysocki refused to talk to plaintiff on multiple occasions, including on July 7, 2005; Dean of Enrollment and Student Services Paul Zelenski told plaintiff in May 2000 that she "can never practice law here in the U.S. of A., and on October 14, 2005 told the registrar in plaintiffs presence that plaintiff "is not going to graduate this term!"; Charles Cercone, Associate Dean of Students, told one of plaintiffs professors in June 2004 not to change plaintiffs grade in her course; her academic advisor from 2003 to 2005 refused to provide her advice, causing her to have to obtain a new advisor; she was forced to complete two exams on December 13, 2003, which with her extra time required her to spend 11 straight hours on the exams; her

Administrative Law exam from the summer of 2005 contained a notation that she was given 5 5 hours to complete the test; and in September 2005 she was advised to drop her appeal of her Administrative Law grade or risk it be deemed frivolous.

Before the fall semester of 2005, which plaintiff had hoped to be her last, her grades ranked her tenth from the bottom of her class. That semester, she received an "F" in her Business Organizations class, as well as poor grades in her other classes that term, Secured Transactions and her retake of Federal Administrative Law. Registrar Wysocki advised plaintiff to file an expedited appeal of these grades if she hoped to graduate. Plaintiff attempted to obtain her exams for the appeal, but the original multiple-choice score sheet had been lost. Nevertheless, on January 11, 2006, plaintiff filed an expedited appeal for all three of her courses. Her appeal was denied on January 18 for failing to comply with a format requirement. This caused her grade point average in required courses to remain below 2.0, the minimum GPA required to graduate. She requested that she be allowed to void her Business Organization's grade under defendant's policy that allows students to void two grades during their matriculation. This request was denied because

even if she voided the Business Organization's grade, her GPA in required courses would be 1.98, still below the minimum. She also was left two credits shy of the ninety credits required to graduate. As a result, defendant did not allow her to graduate in January 2006, and she was dismissed from the law school in March 2006.

On June 20, 2006, the Michigan Court of Appeals reversed the trial court's denial of summary disposition, and remanded with instructions to grant defendant summary disposition on all claims. *Buck v. Thomas M Cooley Law School*, 272 Mich. App. 93, 725 N.W.2d 485 (2006). The state appellate court noted that although defendant had not appealed the injunctive orders, the court believed that injunctive relief was not appropriate in this case because plaintiff had an adequate remedy at law and because the restraining order altered, rather than preserved, the status quo. *Id.* at 98 n.4, 725 N.W.2d at 488 n.5. The Michigan Supreme Court denied leave to appeal on November 29, 2006. *Buck v. Thomas M Cooley Law School*, 477 Mich. 943, 723N.W.2d 858 (2006)(table). On remand, plaintiff brought a renewed motion for injunctive relief, citing her

dismissal from the law school.[1] On January 24, 2007, the state circuit court granted defendant's motion for summary judgment in full and dismissed plaintiff's claims with prejudice.

Plaintiff filed this federal action on December 10, 2007, alleging violation of the Americans with Disabilities Act (ADA), violation of the Michigan Persons with Disabilities Civil Rights Act, and breach of various implied contracts. Defendant moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the lawsuit was barred by the preclusive effect of the prior state court litigation. Alternatively, defendant argued that the harm alleged was not causally related to any wrongful conduct because the Michigan Court of Appeals concluded that plaintiff should not have been granted injunctive relief, and without this relief she would not have been a student at the law school during the years of which she complains. Moreover, defendant argued that the plaintiff's claims for breach of contract in count six failed to state a claim. In a written opinion, the district court accepted each of

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[1] Although this is not part of the record in this case, counsel for both parties conceded this fact during oral argument.

defendant's arguments, and dismissed plaintiff's complaint. Plaintiff appeals.

STANDARD OF REVIEW

"We review de novo a district court's application of the doctrine of res judicata," *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009) (citing *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994)), as well as its decision to grant a Rule 12(b)(6) motion to dismiss, *Ind. State Dist. Council Of Laborers And Hod Carriers Pension And Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 942 (6th Cir. 2009) (citing *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008)). "[W]e accept as true all non-conclusory allegations in the complaint and determine whether they state a plausible claim for relief." *Delay v. Rosenthal Collins Group, LLC*, 585 F.3d 1003, 1005 (6th Cir. 2009) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009)). Although typically courts are limited to the pleadings when faced with a motion under Rule 12(b)(6), a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008).

DISCUSSION

I. Res Judicata

"Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state." *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007) (citing 28 U.S.C. § 1738). Plaintiffs prior litigation took place in Michigan, which employs a "broad view of res judicata," *In re MCI Telecommunications Complaint*, 460 Mich. 396, 431, 596 N.W.2d 164, 183 (1999), that "'bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.'" *Abbott*, 474 F.3d at 331 (quoting *Adair v. State*, 470 Mich. 105, 121, 680 N.W.2d 386, 396 (Mich. 2004)). Res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* (internal quotation marks omitted). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and]

whether they form a convenient trial unit." *Adair*, 470 Mich. at 125, 680 N. W.2d at 398 (internal quotations omitted, emphasis and alteration in original). The burden of proving res judicata is on the party asserting it. *Abbott*, 474 F.3d at 331.

The parties agree that the state litigation was resolved on the merits and involved the same parties as the present lawsuit. The focus of the parties' dispute is whether the claims presented by this lawsuit were or should have been resolved in the prior suit.

The allegations regarding defendant's treatment between 2002 and her second dismissal by the law school in 2006 are part of the same transaction - alleged misconduct and discriminatory animus by defendant towards her as a law student - as the allegations giving rise to her first lawsuit. Plaintiff alleged that defendant tried to deny her accommodations and otherwise interfered with her studies in her original complaint, her supplemental complaint, and her federal complaint. Many of the factual allegations she raises in this lawsuit are identical to those she attempted to add to her state court litigation. For example, she attempted to obtain leave from the state court to add allegations that her academic advisor refused to provide her advice after

the court's injunction required her readmission during the pendency of the lawsuit and that Cercone had instructed her Immigration Law professor not to change her grade. She makes these same allegations in her federal complaint.

Plaintiff argues that her federal complaint alleges many facts that had not occurred at the time that she had filed her state court complaint. She correctly observes that these facts were not - and could not have been - included in plaintiff's original state court complaint when it was filed in 2002. The Michigan Court Rules require only that a pleader "join every claim that the pleader has against that opposing party *at the time of serving the pleading*" arising out of the transaction that is the subject matter of the action. Mich. Ct. R. 2.203(A) (emphasis added).

Nevertheless, under Michigan law, a plaintiff has a duty to supplement her complaint with related factual allegations that develop "during the pendency of her state suit or have them barred by res judicata. *See Adair*, 470 Mich. at 125, 680 N.W.2d at 398; *see also Dubuc v. Green Oak Twp.*, 312 F.3d 736 6th Cir. 2002). The Michigan Court Rules allow a party to supplement a complaint with facts that were not available to it at the onset of the litigation. *See* Mich.

Ct. R. 2.118(E). In *Dubuc*, we held that res judicata barred suit by a plaintiff claiming retaliation by a municipality because the plaintiff had previously complained of retaliation by the same municipality. We concluded that "[w]hen the alleged additional manifestation of retaliatory animus occurs before adjudication on the merits of the initial suit, . . . the victim is obliged to amend his or her initial complaint to add these new allegations." *Dubuc*, 312 F.3d at 750. We emphasized that "[t]he key issue is whether Appellant could have amended his complaint in [the earlier proceeding] to include these new manifestations of alleged retaliation." *Id.* at 749; *see also Adair*, 470 Mich. at 126, 680 N.W.2d at 398 (considering whether "plaintiffs, exercising due diligence, could have filed" their claims during the previous litigation).

Here, plaintiff was able to file a supplemental complaint on April 27, 2005. She is therefore barred in this lawsuit from relying on any facts that she could have brought at that time but did not. It is true the trial court had not allowed her to supplement her complaint with all proposed factual allegations that she wished to add at that time. This was not due to the time of the filing of the motion, however, but because the trial court found that the allegations did

not support plaintiff's cause of action. Plaintiff failed to appeal this adverse ruling, and cannot challenge it in federal court now.

Moreover, plaintiff is barred from litigating matters that occurred prior to the dismissal of her lawsuit in 2007 because she had an opportunity to seek permission from the state trial court to amend her complaint to add recent events after remand, before judgment was entered. It appears not only that plaintiff could - and therefore should - have sought to supplement her complaint with post-2005 facts on remand, but that she actually attempted to and failed. At oral argument, counsel indicated that after plaintiffs case was remanded to the state trial court at the end of 2006, plaintiff brought to the court's attention factual allegations from 2006, including her dismissal from the law school. Although the trial court did not allow this amendment, under res judicata principles, plaintiffs recourse from the state trial court's adverse ruling after remand was to file an appeal in the state system, not file a separate federal lawsuit alleging the same facts. Having unsuccessfully raised the events up to and including her dismissal from the law

school in a prior litigation, she is barred from pursuing them here.[2]

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[2]Because we find that plaintiff should have sought to supplement her complaint in the state trial court following remand, we need not decide whether a plaintiff has a duty under Michigan law to supplement a complaint during the pendency of an appeal. However, we note that there is an apparent conflict in state jurisprudence on this issue. The Michigan Court of Appeals has held that the trial court loses jurisdiction to grant leave to amend after an appeal is filed. *Wiand v. Wiand*, 205 Mich. App 360, 369-370, 522 N.W.2d 132, 136 (1994). Nevertheless, in *Adair*, the Michigan Supreme Court implicitly reached the opposite conclusion by finding the plaintiffs' challenge to various statutory amendments barred by res judicata because they could have raised the issue in a prior litigation. Some of the statutes challenged in Adair had not been adopted in the challenged form until the case was on appeal. For example, Mich. Comp. Laws § 380.1527 was adopted on January 9, 1996, with an effective date of July 1, 1996. 1995 Mich. Pub. Acts 289. Because the Michigan Court of Appeals had issued an opinion on September 19, 1995, the application for leave to appeal was pending before the Michigan Supreme Court when the statute attacked was enacted. Nevertheless, the Supreme Court in *Adair* still found that plaintiff's challenge should have been brought in the prior lawsuit. By imposing a requirement to supplement at any point during the

In order to avoid this conclusion, plaintiff offers a number of "exceptions" to res judicata that she believes prevent its application to her. None of the exceptions urged by plaintiff are applicable here. First, the "new facts" and "unknown claims" exceptions as urged by the plaintiff are not exceptions at all, but a limitation on the reach of preclusion principles. And, as explained above, Michigan preclusion law is broad enough to include plaintiff's federal claims.

Plaintiff also argues that the application of claim preclusion principles to her case would work a "manifest injustice," and that there is an "extraordinary reason" (the state courts' failure to "yield a coherent disposition of the present controversy") not to bar her suit. We have recognized an exception to preclusion principles when "an

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"pendency" of a prior lawsuit, *including* while the case is on appeal before the Michigan Supreme Court, the *Adair* court implicitly held that a party could supplement any time before a final decision is reached by the Michigan Supreme Court. *See Adair*, 470 Mich at 151 n.1, 680N.W.2d at 412 n.1 (Cavanagh, J., dissenting) (disagreeing with the "majority's holding that a party may amend its pleadings at any time before this Court issues a final decision").

inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party." *United States v. LaFatch*, 565 F.2d 81, 84 (6th Cir. 1977) (quotations omitted); *see also Storey v. Meijer, Inc.*, 431 Mich. 368, 377 n.9, 429 N.W.2d 169, 173 n.9 (1988). Plaintiff complains that application of res judicata here would work a "manifest injustice" because she is unable to fulfill her desire to become an attorney. A litigant's suffering the consequences of a prior adverse ruling does not compel the application of this exception. To indulge such reasoning would create an exception that swallows the rule. Plaintiff has not established that her situation falls within the "small category of cases," Restatement (Second) of Judgments § 26, comment i, that qualify for a manifest injustice exception.

Relying on the Second Restatement of Judgments, plaintiff also contends that the "recurrent wrong exception" should be applied to her case. *See* Restatement (Second) of Judgments § 26(1)(e) (stating that res judicata may not apply where, "[f]or reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time

to time for the damages incurred to the date of suit, and chooses the latter course."). She has failed to cite any authority suggesting that such an exception is, in fact, available to her under Michigan law. Moreover, there is no indication that she elected during the course of her initial suit to only sue for a portion of her damages. In fact, we have held that an argument that the defendant is "continuing on the same course of conduct," actually supports application of res judicata. *Dubuc*, 312 F.3d at 751. If such conduct "has previously been found by a court to be proper, a subsequent court must conclude that the plaintiff is simply trying to relitigate the same claim." *Id.* Plaintiff falls well short of establishing that an exception to res judicata should be applied to her case.

CONCLUSION

Because the district court correctly found that plaintiffs suit was barred by res judicata, we AFFIRM

Sixth Circuit Court of Appeals Appellant Reply Brief [Excerpts]

STATEMENT OF THE CASE

Pending before this Court is the instant Appeal by Plaintiff-Appellant, Nahzy Buck, from the United States District Court for the Western District of Michigan ("District Court"), Southern Division, now a published decision, in which the District Court presumably exercised its federal question jurisdiction under 28 U.S.C. § 1331 (although this is nowhere stated in the District Court's opinion). (R. 11, Opinion and Judgment, *Buck v. Thomas Cooley Law School*, 615 F. Supp. 2d 632 (W.D. Mich. 2009) ("Cooley II").)

Whether the District Court correctly dismissed Plaintiff's complaint (R.1) pursuant to FED. R. CIV. P. 12(b)(6) is a question of law subject to *de novo* review. (*Moore v. Philip Morris Cos.*, 8 F.3d 335, 339 (6th Cir. 1993).) The District Court held that Cooley II was barred by claim and issue preclusion due to the prior state-court action: *Nahzy Buck v. Thomas M. Cooley Law School*, 725 N.W.2d 485 (2006) ("Cooley I")). (R.11, Opinion.)

Res Judicata is an equitable doctrine that should not be applied rigidly so as to create a manifest injustice. (*Storey v. Meijer, Inc.*, 429 N.W.2d

169, 173 n.9 (Mich. 1988).) Even when otherwise applicable, res judicata or collateral estoppel will be qualified or rejected if its use would contravene an overriding public policy or result in manifest injustice. *Id.* Cooley's brief is silent on the issue of the "manifest injustice" exception to res judicata and collateral estoppel. (*See* Brief on Appeal on Behalf of Defendant-Appellee.)

While Defendant's brief says nothing about the "manifest injustice" exception, the District Court briefly addressed it, if only to dispense with it. (R 11, Opinion at 639.) Yet the manifest injustice exception is at the heart of Plaintiff's case, in addition to the "new facts" exception and other exceptions as well. (See Appellee's Brief, 3, 18, 23-24, 35-36, 37-38.)

Res judicata and collateral estoppel are different theories that often lead to the same result. In *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971), this Court affirmed the manifest injustice exception: "Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." In *United States v. La Fatch*, 565 F.2d 81, 84 (6th Cir. 1977), this Court has further said: "A contrary result, to use the language of

Professor Moore, would create a situation where 'res judicata renders white black, the crooked straight'." (Citation omitted.)

Instantly, the District Court has rendered the white black by finding that the new facts were not controlling facts, and has rendered the crooked straight by holding that no manifest injustice resulted, thereby upholding general preclusion in the case at bar:

> Plaintiff nonetheless argues that res judicata is not to be rigidly applied, and that its application must be qualified or rejected when its use would contravene an overriding public policy or result in manifest injustice, citing *Storey v. Meijer, Inc.*, 431 Mich. 368, 429 N.W.2d 169, 173 n.9 (Mich. 1988). However, the Court finds no such circumstances in this case. Plaintiff had the opportunity to fully litigate her previous claims against defendant. Although she may point to additional facts in support of her new claims, the controlling facts in this case have not changed significantly. Further, as defendant points out, to the extent that the trial court denied plaintiff's request to supplement her complaint and granted defendant's motion to dismiss plaintiff's claims, plaintiff failed to appeal those decisions. (R.11, Opinion at 639.)

The very fact that Cooley was accepting Plaintiff's tuition money over the course of three years and eight months (May 2002-January 2006)-while, all along, Cooley was determined never to award Plaintiff her juris doctor degree under any circumstances-was a manifest injustice, in and of itself. Manifest injustice of the type necessary to except a case from the application of claim and issue preclusion is present here.

I. THE DISTRICT COURT ERRED IN RIGIDLY APPLYING RES JUDICATA AND COLLATERAL ESTOPPEL IN SUMMARILY DISPENSING WITH PLAINTIFF'S MANIFEST JUSTICE EXCEPTION.

There's a certain irony here, when one looks at the wider significance of the District Court's published opinion. On the very issue of the manifest injustice exception, the District Court's decision has suddenly leapt into an unanticipated prominence in legal searches of relevant case law. When the keywords "manifest injustice," "res judicata," and "student" are entered into LexisNexis's "Federal & State Cases, Combined" database, the *first* case that

comes up as the very case under review, *Buck v. Thomas Cooley Law School* (R. 11, Opinion)).

Similarly, when the keywords, "manifest injustice," "collateral estoppel," "law school" and "student" are invoked, the instant case under review also comes up as the *first* most relevant case. When the keywords "temporary restraining order," "manifest injustice," "law school" and "student," are queried, the decision under review comes up as the *second* case out of maximum 100 results. When three search terms "res judicata," "manifest injustice," and "retaliation" are input in LexisNexis Academic, the District Court decision under review comes up as #7 out of 97 cases.

In Appellee's Brief, Cooley not once responded to Plaintiff's manifest injustice argument. Instead, Cooley has explicitly admitted, perhaps for the very first time, that it *never* had any intention of graduating Plaintiff, Nahzy Buck, had she successfully completed all of her requirements for graduation.

> Plaintiff was not entitled to conferral of degree because of the events which occurred after entry of the TRO because she was not entitled to conferral of a degree prior to entry of the TRO. Indeed, had Plaintiff accumulated

> sufficient credits, no degree would have been conferred unless and until she succeeded in her claim that she was improperly dismissed in 2001. (Appellee's Brief, 25, n.10; see also similar statement on 23.)

This Court has discretion to consider a statement made in an appellate brief to be a judicial admission, binding on both this Court and the District Court: "Where a statement in an appellate brief is 'deliberate, clear and unambiguous,' as is Appellant's statement, the Panel has discretion to consider the statement to be a judicial admission." *(Robilio v. Stevenson (In re Robilio)*, 2007 Bankr. LEXIS 2264 (6th Cir. 2007) (citation omitted).)

Cooley's admission, Plaintiff submits, qualifies as a manifest injustice and should shock the judicial conscience of this Court. All the while that Nahzy Buck was paying tuition, attending lectures, spending countless hours studying, writing final exams, and cumulatively earning 88 credits out of the 90 credits required for graduation, Cooley withheld its secret intent by not disclosing to Nahzy that Cooley was determined never to confer on her a juris doctor degree, even had she made the Dean's List every semester (instead of just one semester). Perhaps no other law school has harbored such deep animus towards one of its own students.

Cooley's admission is only the tip of the iceberg. This Court can only imagine what Nahzy had to go through in such a hostile learning environment. While, in her very last term in fall 2005, Cooley's administrators were preparing Plaintiff for graduation during which time her graduation picture was taken, and by having her cap and gown measured, and her graduation name verified at no time did Defendant ever tell Plaintiff of Cooley's intention never to confer Plaintiff's degree, if earned. Notwithstanding the fact that Cooley Law school had been accepting Nancy's tuition money all along, from May 2002 through December 2005, Cooley has perpetrated a great deception on this student, and was unjustly enriched for above $100,000 tuition in the process.

While a law student pays tuition to receive credits for a legal education, those credits are to fulfill requirements for the conferral of a juris doctor degree. This manifest injustice inheres not just in Cooley's deep-seated animus, but in its grand deception in giving the appearance that Plaintiff was working toward her degree like any other similarly situated student, while Defendant getting unjustly enriched in the process.

Clearly, the manifest injustice exception is the proverbial "elephant in the room" the "room" being this courtroom. To reach the question of whether a manifest injustice to Plaintiff did, in fact occur, and whether the District Court's dismissal of the instant case will result, in theory, in a manifest injustice, the causation arguments first have to be revisited.

* * * * * * * * *

Plaintiff submits that, while Cooley II is predicated on Cooley I, Cooley II is *not* a re-pleading of Cooley I under different theories based on the same core of facts. The federal action is not the ghost of the state action. Rather, a cause and effect relationship exists between Cooley I and Cooley II, such that Cooley I is the *cause* of Cooley II. Simply put, Plaintiff's claims of retaliation and a hostile learning environment were not brought in Cooley I (except insofar as "retaliation" was applied to Cooley's initial refusal to comply with the TRO on April 22, 2002). In Cooley I, moreover, Plaintiff was a first-year law student, whereas in Cooley II, Plaintiff had all but completed her required course work and was on the verge of receiving her juris doctor degree.

Plaintiff has adduced new facts that can differentiate her state lawsuit from her federal claim and thus defeat the application of res judicata and collateral estoppel. After careful review of the record in this instant matter, this honorable Court should conclude that the case at bar, Cooley II, is not identical in form and substance to Cooley I, except insofar as Cooley I is the "protected activity" for which Plaintiff claims Defendant retaliated in the much later events in Cooley II.

As previously stated, Cooley's brief is silent on the issue of the "manifest injustice" exception to res judicata and collateral estoppel. The District Court declined to adopt any exceptions to res judicata or collateral estoppel. However, this is one of those rare cases in which a strict application of res judicata and collateral would be inappropriate.

Preclusion is an equitable doctrine, not a bright line rule. Plaintiff submits that an inflexible application of preclusion principles in the instant case will result in manifest injustice. One injustice that is urged is that there was no full and fair opportunity to litigate her retaliation claims during the second enrollment period (May 2002-March 2006) for having engaged in the "protected activity" of filing her state-court action, which focused on events primarily in the first enrollment period (May 2001-June 2001). Plaintiff's having engaged in a "protected activity"-in filing Cooley I-will not have been "protected" if preclusion is strictly applied to Cooley II.

The most compelling injustice to Plaintiff is to have substantially completed the requirements for a juris doctor degree-in a allegedly hostile learning environment-and, on the eve of her graduation, after being fitted for cap and gown with her graduation

portrait taken, to have been denied her degree, foreclosing on any remaining hope for a legal career, saddling her with an enormous debt of student loans, with several valuable years of her life having been spent in vain-with Cooley, all the while, having resolved never to confer on Nahzy Buck a degree, under any circumstances. Under Defendant's logic, had Cooley awarded Nahzy Buck a Juris Doctor degree before the Court of Appeals ruled, Cooley would have been warranted in rescinding the degree in the wake of the Court's decision. This, Plaintiff submits, is manifest injustice.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NAHZY A. BUCK,
Plaintiff, Case No. 1:07-cv-1230

v HON. JANET T. NEFF

THOMAS COOLEY LAW SCHOOL,
Defendant.

OPINION

Plaintiff Nahzy A. Buck is a former student at Defendant Thomas M. Cooley Law School. Plaintiff filed this action in federal court seeking relief related to her academic dismissal from law school in January of 2006, after plaintiff's prior state-court action involving her 2001 academic dismissal was decided in favor of defendant. Plaintiff's 91-page federal complaint alleges seven counts pertaining to her court-ordered enrollment in law school during the pendency of her state case: Count 1, Hostile Learning Environment Discrimination (Americans with Disabilities Act [ADA] Title III), 42 U.S.C. § 12101 *et seq.*; Count 2, Disability Discrimination (ADA Title III), 42 U.S.C. § 12182(a); Count 3, Interference and Intimidation (ADA Title V), 42 U.S.C. § 12203(b),

Count 4, Retaliation (ADA Title V), 42 U.S.C. § 12203(a), Count 5, Retaliation, Michigan's Persons with Disabilities Civil Rights Act[1] (PWDCRA), MICH. COMP. LAWS § 37.1102, Count 6, Breach of Contract, and Count 7 (Punitive Damages), 42 U.S.C. § 12188.

Pending now before the Court is Defendant Thomas M. Cooley Law School's Motion to Dismiss (Dkt 5). Plaintiff has filed a Response (Dkt 6), and defendant has filed a Reply (Dkt 7). This motion is being decided without oral argument. *See* W.D. Mich. LCivR 7.2(d).

The Court has carefully considered the parties' briefs and the recent supplemental authority filed by plaintiff (Dkt 9). For the reasons that follow, the Court grants defendant's Motion to Dismiss.

I. Background

Plaintiff was a student at Thomas M. Cooley Law School from May 2000 until June 6, 2001, when she was dismissed for failing to meet the school's

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[1]MICH. COMP. LAWS § 37.1101 *et seq.*, formerly known as the "Handicappers' Civil Right Act."

academic standards.[2] Plaintiff was denied admission as a restart student.

On April 12, 2002, plaintiff filed a lawsuit against defendant in state court alleging that defendant had failed to recognize and accommodate her learning disability. Plaintiff's state-court complaint alleged four counts: Count 1, Violation of Fiduciary Duty; Count 2, Violation of Michigan Consumer Protection Act; Count 3, Violation of Michigan Handicapper's Civil Rights Act, MICH. COMP. LAWS § 37.1402(B) [PWDCRA]; and Count 4, Violation of Plaintiff's Constitutional Due Process Rights.

After commencing her lawsuit in state court, plaintiff sought, and on April 15, 2002, was granted an *ex parte* Temporary Restraining Order (TRO), requiring defendant to permit plaintiff to reenroll in law school and attend classes as are offered to any

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[2] Plaintiff was on academic probation for her first two terms because her grade point average for each term was below the required 2.00 average. During plaintiff's third term, she was diagnosed with a learning disorder and granted an accommodation by defendant, permitting her double time for taking examinations. Despite the accommodation, plaintiff did not meet the required grade point average at the end of her third term and was dismissed

other similarly-situated law student (Pl. Resp. Br., Ex. E). Plaintiff thereafter continued her enrollment in law school (based on the TRO) during the pendency of her state court lawsuit until she was again dismissed in March 2006 for academic reasons, without being conferred a law degree despite that she had acquired 88 of 90 credits.

It is defendant's alleged conduct related to plaintiff's court-ordered enrollment that is at issue in the instant federal action. Although plaintiff's state court lawsuit concluded with the dismissal of all claims against defendant by decision of the Michigan Court of Appeals on June 20, 2006,[3] *Buck v. Thomas M Cooley Law Sch.*, 725 N.W.2d 485 (Mich. Ct. App. 2006), plaintiff has based her second lawsuit on allegations of retaliation and wrongful dismissal against defendant for having denied plaintiff her Juris Doctor degree (Pl. Resp. Br. 2). Defendant has moved for dismissal of plaintiff's claims pursuant to FED. R. CIV. P. 12(b)(6) on the grounds that plaintiff's claims are barred by collateral estoppel and res judicata.

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[3] Plaintiff's application for leave to appeal the Court of Appeals decision to the Michigan Supreme Court was denied. *Buck v. Thomas M Cooley Law Sch.*, 723 N.W.2d 858 (Mich. 2006).

II. Legal Standard

In deciding a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6), the court must treat all well-pleaded allegations in the complaint as true and draw all reasonable inferences from those allegations in favor of the nonmoving party. *Lambert v. Hartman*, 517 F. 3d 433, 439 (6th Cir. 2008); *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). "A claim survives this motion where its '[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.'" *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544; 127 S. Ct. 1955, 1959 (2007)). Stated differently, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 127 S. Ct. at 1974.[3]

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[3] Because *Twombly* considered a Rule 12(b)(6) motion in the context of federal antitrust litigation, the courts are not universal in applying the standard to cases that do not involve antitrust claims. *Delta Turner v. Grand Rapids – Kent County Convention/Arena Authority*, Case No. 1:08cv-544, 2009 U.S. Dist. LEXIS 6784 at *7 n.1 (W.D. Mich.

Dismissal under Rule 12(b)(6) is properly granted if the claims alleged are barred by res judicata. *Amadasu v. Christ Hosp.*, 514 F.3d 504, 507 (6th Cir. 2008).

"[D]ocuments attached to the pleadings become part of the pleadings and may be considered on a motion to dismiss." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335 (2007) (citing FED. R. CIV. P. 10(c)). Also, "[a] court may consider matters of public record in deciding a motion to dismiss without converting the motion to one for summary judgment." *Id.* at 336.

III. Discussion

Defendant premises its motion for dismissal on two primary, essentially independent, arguments. First, defendant argues that plaintiff's claims fail because she cannot show that any alleged acts by defendant *caused* her alleged harm. Second,

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January 30, 2009) (citing *Total Benefits Planning Agency, Inc. v. Anthem BCBS*, 552 F.3d 430, 434 n.2 (2008)). Regardless, the Court finds no distinction that would alter the disposition with respect to the claims in this case.

defendant argues that plaintiff's claims in Counts 1 through 5 are barred by res judicata and collateral estoppel. The Court concludes that defendant is entitled to dismissal on both grounds. The Court also concurs with defendant's additional argument that Count 6, plaintiff's breach of contract claim, is without basis and, therefore, is properly dismissed.

A. Causation

Defendant initially argues that plaintiff cannot succeed on any theory of liability alleged in the instant action because she cannot show a causal relationship between the harm she seeks to remedy and the alleged discrimination and retaliation (during her court-ordered reenrollment) given the state courts' determination that her dismissal by defendant in June 2001 was proper. Defendant asserts that the state court judgment conclusively establishes that plaintiff was not entitled to be a student at Cooley Law School, let alone graduate, and that collateral estoppel precludes plaintiff from arguing otherwise. Defendant argues that since plaintiff's right to be a student was properly terminated in June 2001, defendant had no obligation to confer a law degree upon plaintiff. Thus,

plaintiff cannot show that any act of discrimination or retaliation caused the denial of her degree.

In response, plaintiff contends that defendant's argument is a technical defense that cannot withstand scrutiny. Plaintiff argues that whether a court order is later determined to be erroneous is immaterial to defendant's obligations, and that plaintiff's civil rights remained inviolable (Pl. Resp. Br. 10).

Defendant's causation argument is logical from a factual standpoint. It stands to reason that since plaintiff was properly dismissed in June 2001 for academic reasons, as determined by the circuit court and the Michigan Court of Appeals, plaintiff was not entitled to continued enrollment to secure a law degree from Cooley Law School. Moreover, plaintiff was dismissed a second time for failure to meet Cooley Law School's minimal academic standards in March 2006. That plaintiff had acquired 88 of 90 credits required for graduation is unfortunate, but not necessarily relevant to plaintiff's legal claims.

Likewise, defendant's argument withstands scrutiny from a legal standpoint. The state courts

found no legally cognizable claim against defendant related to her first period of enrollment at Cooley Law School. Since plaintiffs 2001 dismissal was proper, and her second enrollment emanated from the TRO, she had no entitlement to enrollment once the TRO was no longer of any legal effect, absent a further ruling of the Michigan courts, which plaintiff did not seek. Regardless of any other relief that plaintiff may seek for alleged discrimination and retaliation, she would not be entitled to take the additional classes or acquire the remaining credits necessary to graduate. Thus, this Court fails to find any legal grounds for the ultimate relief sought by plaintiff, which is conferral of a Juris Doctor degree. Plaintiff would not be entitled to reinstatement of enrollment for a dismissal that was proper and upheld by the state courts. Accordingly, plaintiff's claims fail in the first instance because she cannot show that defendant caused the injury that she seeks to remedy.

"'An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination.'" *Yinger v. City of Dearborn*, Case No. 96-2384, 1997 WL 735323 at *5 n.3 (6th Cir. November 18, 1997) (unpublished table decision) (quoting *Lever v. Northwestern Univ.*, 979 F.2d 552,

556 (7th Cir. 1992). Logically then, an employer's refusal to undo a nondiscriminatory decision cannot be a fresh act of discrimination. Under the same reasoning, defendant's refusal to undo plaintiff's nondiscriminatory dismissal in June 2001 is not a basis for a claim of discrimination or retaliation.

B. Res Judicata and Collateral Estoppel

As noted at the outset of this opinion, this is the second lawsuit plaintiff has brought against defendant stemming from her enrollment as a law student at Cooley Law School. Plaintiff previously filed suit in Ingham Circuit Court alleging four claims related to her academic dismissal in 2001: (1) Violation of Fiduciary Duty; (2) Violation of the Michigan Consumer Protection Act; (3) Violation of Michigan Handicapper's Civil Rights Act, MICH. COMP. LAWS § 37.1402(B) [PWDCRA]; and (4) Violation of Plaintiffs Constitutional Due Process Rights. Defendant moved for summary disposition of all counts of plaintiff's state court complaint. Plaintiff stipulated to the dismissal of Count 4 (violation of due process), and the trial court granted dismissal of plaintiff's remaining claims, except plaintiffs claim under the PWDCRA. *Buck*, 725 N.W.2d at 488. The Michigan Court of Appeals granted defendant leave

to appeal the trial court's order denying defendant's motion for dismissal of plaintiff's PWDCRA claim. *Id.* at 486. In a decision issued June 20, 2006, the Michigan Court of Appeals reversed the Ingham Circuit Court's decision and remanded the case for entry of an order granting defendant's motion for summary disposition.

During the course of her state court lawsuit against defendant, on March 4, 2005, plaintiff filed a motion for leave to file a supplemental complaint (Pl. Resp. Br. 5, Ex. H).[5] Plaintiff sought to expand her claim under the PWDCRA based on numerous acts of prohibited conduct by defendant since the filing of her original complaint, i.e., during her court-ordered reenrollment at Cooley Law School (*id.*). Plaintiff alleged seventeen specific incidents of prohibited conduct, sixteen of which concerned defendant's repeated refusal to honor the court's TRO in 2002 (Pl. Resp. Br. 5, Ex. H). Following a hearing on March 30,

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[5] The parties have filed numerous exhibits to their briefs on the motion to dismiss in this Court. There is no dispute that this Court may consider these documents as matters of public record in deciding the instant motion without converting the motion to one for summary judgment. *See Commercial Money Ctr.*, 508 F.3d at 335-36.

2005, the circuit court granted plaintiffs motion to supplement her complaint as to the sixteen acts, but not the seventeenth (a bad grade in a 2004 class) (PI. Resp. Br. 5). Plaintiff filed her supplemental complaint on April 25, 2005 (PI. Resp. Br., Ex. J).

Plaintiff did not appeal the trial court's decision limiting the amendment of her complaint. Nor did plaintiff appeal any other orders of the circuit court or file a cross-appeal when defendant appealed the court's denial of defendant's motion to dismiss plaintiff's PWDCRA claim.

Defendant contends that plaintiff's prior litigation in state court and her failure to appeal any decisions of the circuit court warrant dismissal of this case because plaintiff's instant claims are barred under principles of res judicata and collateral estoppel. It is well-settled that when a prior judgment has been entered in state court, that judgment is entitled to the same preclusive effect that it would receive under the law of the state in which it was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Young v. Twp. of Green Oak*, 471 F.3d 674, 680 (6th Cir. 2006). Likewise, the state's law of collateral estoppel will be consulted to determine issue preclusion. *McKinley v. City of Mansfield*, 404 F.3d 418, 428 (6th Cir. 2005).

1. Counts 1 through 5

Defendant argues that Counts 1 through 5 of plaintiff's instant federal complaint are barred by res judicata and collateral estoppel. Defendant asserts that the state court had concurrent jurisdiction to consider these federal claims, but plaintiff chose not to include the claims in the state court action. Defendant also asserts that at the time of plaintiff's second dismissal from Cooley Law School, the state litigation was still pending, yet plaintiff made no complaint to the circuit court that this dismissal constituted a violation of the PWDCRA, the ADA or even the TRO pursuant to which she had been attending classes. Defendant argues that gi ven these circumstances, plaintiff's claims in Counts 1 through 5 are barred by res judicata and collateral estoppel.

Plaintiff responds that her state and federal court actions arise from her two separate periods of enrollment at Cooley Law School. She asserts that her federal suit relies on *new facts* and *new legal theories* in support of her *new claims* (Pl. Resp. Br. 2). Plaintiff concedes that some facts in her new complaint are identical to facts pled in her state court case, but she asserts that these allegations are only to provide a comprehensive background to the events

that transpired during her second enrollment (Pl. Resp. Br. 12).

Plaintiff attempts to distinguish her first (state-court) "cause of action" as principally a "Misleading/Misdiagnosis Claim" and an "Accommodation Claim" based on the court's characterization in *Buck*, 725 N.W.2d at 488-91(Pl. Resp. Br. 4). Plaintiff contends that her new claims have never been litigated.

"The doctrine of res judicata bars a successive action in Michigan if '(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.'" *Young*, 471 F.3d at 680 (quoting *Adair v. Michigan*, 680 N.W.2d 386, 397 (Mich. 2004). "If the three elements are established, then res judicata serves to bar 'every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.'" *Id.* (quoting *Adair*, 680 N.W.2d at 397).

It is undisputed that the first and second elements are met in this case. The issue is whether the matters now raised by plaintiff could have been resolved in the state court action. Given the

facts and circumstances presented, the Court concludes that plaintiff's claims are barred by principles of res judicata.

Plaintiff argues that her claims in this lawsuit are based on new facts and new theories. However, both lawsuits are premised on the same underlying occurrence-plaintiff's enrollment as a law student at Cooley Law School. And although plaintiff insists that her lawsuits involve two factually distinct periods of enrollment at Cooley, this Court finds any such distinction merely arbitrary. Plaintiff's second period of court-ordered enrollment occurred during the course of her state-court litigation. For purposes of her action against defendant, her second enrollment was essentially a continuation of her initial enrollment.

"'Michigan has adopted the 'broad' application of res judicata, which bars claims arising out the same transaction or that plaintiff could have brought but did not, as well as those questions that were actually litigated.'" *Yinger*, 1997 WL 735323 at *5 (quoting *Jones v. State Farm Auto. Ins. Co.*, 509 N.W.2d 829, 834 (Mich. Ct. App. 1993)); *see also Young*, 471 F.3d at 680. Michigan's

broad application of res judicata does not permit such artificial distinctions as those argued by plaintiff to avoid the preclusive effects of prior litigation:

> [R]es judicata extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). The test for determining whether two claims stem from the same transaction and, for purposes of res judicata, are identical is whether "the same facts or evidence are essential to the maintenance of the two actions." *Jones*, 509 N.W.2d at 834.

Yinger, 1997 WL 735323 at *5.

Plaintiff states that the relationship between her new claims and her old claims is clear and simple: plaintiff's state action was a lawful "protected activity" in which plaintiff engaged and, as a result of which, she experienced adverse consequences (Pl. Resp. Br. 2, 7). However, the heart of plaintiff's claims in each lawsuit is defendant's discrimination against plaintiff culminating in her dismissal from law school. And although plaintiff complains that the

harm she seeks to remedy in this suit is distinct from the injury she sought to remedy in her state lawsuit, "' a discrimination claim accrues when the operative decision is made, not when [a plaintiff] experiences the consequences of that decision.'" *Young*, 471 F.3d at 680 (citing *Yinger*, 1997 WL 735323 at *4).

The ADA claims presented in this case are based on substantially the same conduct that plaintiff complained of in her state court litigation. Plaintiff sought to add similar claims to her state litigation by amending her complaint. At the hearing on plaintiff's motion to amend her complaint in her state lawsuit, which was held on March 30, 2005, plaintiff argued that since the filing of her original complaint, defendant had engaged in acts of retaliation against her (Pl. Resp. Br., Ex. 1, 3/30/05 Tr. 4, 6, 15). Although not all the current alleged specific instances of prohibited conduct cited in this lawsuit were necessarily known at the time of her previous suit, the gist of plaintiff's supplemental claims was apparent. Plaintiff could have raised her new ADA theories in her prior litigation, but did not. For that reason, under Michigan law, plaintiff's claims are precluded on the basis of res judicata. Plaintiff's supplemental authority involving more

recent application of Michigan law does not change this Court's conclusions.

Plaintiff nonetheless argues that res judicata is not to be rigidly applied, and that its application must be qualified or rejected when its use would contravene an overriding public policy or result in manifest injustice, citing *Storey v. Meijer, Inc.*, 429 N.W.2d 169, 173 n.9 (Mich. 1988). However, the Court finds no such circumstances in this case. Plaintiff had the opportunity to fully litigate her previous claims against defendant. Although she may point to additional facts in support of her new claims, the controlling facts in this case have not changed significantly. Further, as defendant points out, to the extent that the trial court denied plaintiff's request to supplement her complaint and granted defendant's motion to dismiss plaintiff's claims, plaintiff failed to appeal those decisions.

2. Count 6, Breach of Contract

Defendant argues that plaintiff's breach of contract claim and any related due process claim arising out of plaintiff's enrollment cannot be maintained because plaintiff is collaterally estopped from denying that she was properly dismissed from the law school in June 2001. This Court agrees.

The Court finds no basis for plaintiff's breach of contract claim, given the Michigan state courts' dismissal of plaintiff's claims concerning her June 2001 dismissal and the Michigan Court of Appeals indication that the TRO ordering the second enrollment was improper. Plaintiff's breach of contract claim is therefore properly dismissed.

IV. Conclusion

For the reasons stated above, defendant's Motion to Dismiss plaintiff's complaint is granted.

A Judgment consistent with this Opinion shall enter.

DATED: March 18, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NAHZY A. BUCK,
Plaintiff,

Case No. 1:07-cv-1230

v.

HON. JANET T. NEFF

THOMAS COOLEY LAW SCHOOL,
Defendant.

JUDGMENT

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that Defendant's Thomas M. Cooley Law School's Motion to Dismiss (Dkt. 5) is GRANTED.

IT IS FURTHER ORDERED that this Judgment resolves all pending claims in this case, and therefore, the action is TERMINATED.

DATED: March 18, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

NAHZY BUCK,
Plaintiff, File No, 02-541-CZ

v. HON. JAMES R. GIDDINGS

THOMAS M. COOLEY LAW SCHOOL,
Defendant.

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ORDER FOR STAY OF PROCEEDINGS

At a session of said Court, held in the City of Lansing, County of Ingham, State of Michigan, on this 8th day of 2005.

PRESENT: HONORABLE JAMES R. GIDDINGS Ingham County Circuit Court Judge

Defendant having filed its Motion For Stay of Proceedings pending appeal pursuant to MCR 7.209(E); and the parties, through their respective counsel of record, having appeared before this Court on June 22, 2005, for purposes of argument regarding said motion; and this Court otherwise being fully advised in the premises; now, therefore

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion For Stay of Proceedings pending appeal be and is hereby granted and all proceedings and actions connected with and/or ordered by this Court with respect to the matter pending before it, including the jury trial scheduled for November 28, 2005, shall be stayed.

/s/ James R. Giddings
HON. JAMES R. GIDDINGS

ATTEST: A TRUE COPY

/S/ Mallha Kahai
Deputy Clerk

REGISTER OF ACTION [EXCERPTS PGS. 8-9]

109 03/04/2005	MOTION FEE ATTORNEY: HIRSBRUNNER, THOMAS S (66919) RECEIPT: 129173 DATE: 03/04/2005
110 03/09/2005	HEARING SET. EVENT: MOTION (MISC) DATE: 03/16/2005 TIME: 3:40 PM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS
111 03/16/2005	DF'S RESPONSE TO PLT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT W/PS 031405 VIA US MAIL
112 03/18/2005	MOTION FEE ATTORNEY: HIRSBRUNNER, THOMAS S (66919) RECEIPT 130223 DATE: 03/18/2005
113 03/18/2005	MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT; AFFIDAVIT; SUPPLEMENTAL COMPLAINT W/PS 031805 VIA FIRST CLASS MAIL; NOTICE OF HEARING 033005
114 03/22/2005	HEARING SET: EVENT: MOTION FOR LEAVE DATE: 03/30/2005 TIME: 3:40 PM JUDGE: GIDDINGS, JAMES R

	LOCATION: JUDGE GIDDINGS
115 04/05/2005	NOTICE OF SUBMISSION 7-DAY ORDER; ATTACHED PROPOSED ORDER W/PS 040505 VIA US MAIL SERVED UPON M CASEY
116 04/11/2005	NOTICE OF HEARING TO RESOLVE CONTENT OF PROPOSED ORDER SUBMITTED UNDER MCR 2.602B3 ON 042705 AT 2:20 P.M.; DF'S OBJECTION TO PLT'S NOTICE OF PRESENTMENT ORDER W/PS 040805 VIA FIRST CLASS MAIL
117 04/18/2005	RE-NOTICE OF HEARING TO RESOLVE CONTENT OF PROPOSED ORDER 051105 @ 2:00 W/PS 041505 VIA FIRST CLASS MAIL
118 04/26/2005	COMPLAINT FILED (SUPPLEMENTAL) W/PS 042505 VIA FIRST CLASS MAIL UPON M MCCASEY
119 04/27/2005	TRANSCRIPT OF PROCEEDINGS–VIDEO MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT 033005
120 04/27/2005	STIPULATION AND ORDER TO EXTEND DATE TO FILE

		RESPONSIVE PLEADINGS TO PLT'S SUPPLEMENTAL COMPLAINT
121	04/28/2005	ORDER (ALTERNATE) AS REQUIRED UNDER MCR 2.602 W/RESPECT TO PLTS PRESENTMENT OF ORDER DATED APRIL 5, 2005 SIGNED 042605
122	04/29/2005	ORDER GRANTED TO EXTEND DATE TO FILE RESPONSIVE PLEADINGS TO PLT'S SUPPLEMENTAL COMPLAINT (SIGNED 042805)
123	05/02/2005	HEARING SET: OBJECTIONS DATE: 05/11/2005 TIME: 2:00 PM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS
124	05/05/2005	HEARING ADJOURNED THE FOLLOWING EVENT: PRETRIAL SCHEDULED FOR 04/25/2005 AT 3:30 PM HAS BEEN RESULTED AS FOLLOWS: RESULT: C30 ADJOURNED
125	05/05/2005	HEARING ADJOURNED THE FOLLOWING EVENT: JURY TRIAL CIVIL SCHEDULE FOR 05/23/2005 AT 8:30 AM HAS BEEN RESULTED AS

	FOLLOWS: RESULT C30 ADJOURNED
126 05/05/2005	NOTICE PRETRIAL AND JURY TRIAL W/PS 050505 VIA ORDINARY MAIL (5TH AMENDED)
127 05/05/2005	HEARING SET: EVENT: PRETRIAL DATE: 10/31/2005 TIME: 3:45 PM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS RESULT: EVENT CANCELLED
128 05/05/2005	HEARING SET: EVENT: PRETRIAL DATE: 10/31/2005 TIME: 3:45 PM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS RESULT: STAY
129 05/05/2005	HEARING SET: EVENT: JURY TRIAL CIVIL DATE: 11/28/2005 TIME: 8:30 AM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS RESULT: STAY
130 05/11/2005	ANSWER TO SUPPLEMENTAL COMPLAINT; AFFIRMATIVE DEFENSES; RELAINCE ON JURY DEMAND W/PX 051005 VIA FIRST CLASS MAIL
131 05/19/2005	ORDER FROM THE COURT OF APPEALS THAT THE

	MOTION TO ADJOURN IS GRANTED
132 05/31/2005	PROOF OF SERVICE 052605 VIA FIRST CLASS MAIL - DF'S FIRST SET OF INTERROGATORIES TO PLT AND REQUEST TO PRODUCE
133 06/06/2005	CERTIFICATE OF REPORTER NICOLE STRANGE ORDERED BY MICHAEL MCCASEY HAS BEEN FILED WITH THE COURT
134 06/13/2005	MOTION FEE RECEIPT 135938 DATE 06/13/2005
135 06/13/2005	MOTION TO STAY PROCEEDINGS; NOTICE OF HEARING 062205 @ 2:00 W/PS 060905 VIA FIRST CLASS MAIL
136 06/14/2005	HEARING SET: EVENT: MOTION TO STAY (PROCEEDINGS) DATE: 06/22/2005 TIME: 2:00 PM JUDGE: GIDDINGS, JAMES R LOCATION: JUDGE GIDDINGS
137 06/16/2005	TRANSCRIPT OF PROCEEDINGS 042502-MOTION
138 06/16/2005	NOTICE OF FILING TRANSCRIPT

139	06/16/2005	TRANSCRIPT OF PROCEEDINGS–MOTION APRIL 25, 2002
140	06/30/2005	NOTICE OF SUBMISSION 7-DAY ORDER FOR STAY W/PS 062805 VIA FIRST CLASS MAIL
141	07/08/2005	ORDER GRANTED DF'S MOTION FOR STAY OR PROCEEDINGS PENDING APPEAL (SIGNED ON JULY 8)